Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

THE CITY OF LONG BEACH,

Petitioner,

v.

JOHN B. FAIRLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Pursuant to this court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986), may a city be held liable under Section 1983 when a jury has determined that the individual officers did not inflicted any constitutional harm?

2. Pursuant to this court's decision in *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979), may an individual's detention on a valid warrant create a constitutional injury because a City failed to institute an identification procedure that may have disclosed that the prisoner was the wrong person?

3. Pursuant to this court's decisions in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611 (1978) and *Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412 (1989), may a plaintiff establish liability against a municipality under Section 1983 based upon a city's failure to initiate procedures to reduce the likelihood of detaining the wrong individual on a warrant, when there is no evidence of any pattern of similar incidents prior to plaintiff's arrest?

PARTIES TO THE PROCEEDING

Petitioner is the City of Long Beach who was defendant in the district court and appellant in the Ninth Circuit Court of Appeals.

Respondent John B. Fairley was plaintiff in the district court and appellee in the Ninth Circuit Court of Appeals.

The police officers, who were original named co-defendants with the Petitioner, are no longer parties to this proceeding.

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Petitioner respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINION BELOW

The Ninth Circuit opinion (App. A) is reported at *Fairley v. Luman*, 281 F.3d 913 (9th Cir. 2002).

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was entered on February 15, 2002 (App. A).

A petition for rehearing and suggestion for rehearing en banc was timely filed. In an order dated April 2, 2002, the Ninth Circuit Court of Appeals entered an order denying the petition for rehearing and suggestion for rehearing en banc (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The Fourth Amendment states:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported under oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourteenth Amendment states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

> 42 U.S.C. § 1983. Civil Action for Deprivation of Rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects,

> or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, and Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On Saturday April 26, 1997, Plaintiff John Fairley was placed under citizen arrest by Jeffrey Adams for violation a restraining order, and Long Beach Police Officers Javellana and Romero took plaintiff into custody.

After plaintiff Fairley was placed in the backseat of the police car, officers ran a warrant check on plaintiff and discovered two outstanding warrants that matched plaintiff's general description, warrant H66251202160 and warrant 86874119420.[1] The warrant information and booking information is as follows:

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1. Plaintiff contends that the two warrants were for his twin brother.

	WARRANT 86874119420	WARRANT H66251202160	BOOKING INFORMATION
NAME:	Joseph Benjamin Fairley	Joseph Fairley	John Fairley
DOB:	12-02-66	12-02-66	12-02-66
HAIR:	Black	Black	Black
EYES:	Brown	Black	Brown
HEIGHT:	5' 7"	5' 8"	5' 6"
WEIGHT:	190	140	206
SEX:	Male	Male	Male
ETHNIC:	Black	Black	Black
License #:	C5031440	A5388038	C5031444

Sergeant Ford, the booking sergeant, approved the booking of plaintiff for violation of a restraining order and also had plaintiff held on the above mentioned warrants.

On Monday April 28, 1997, the prosecutor declined to file charges against plaintiff for the restraining order violation, and plaintiff was released to the Los Angeles County Sheriff's Department who would handle the outstanding warrants from the Los Angeles County Court System.

On April 27, 1998, plaintiff filed his lawsuit for alleged violation of his constitutional rights by defendants. Plaintiff alleged that he was arrested without probable cause and was subjected to excessive force or unreasonable force in violation of the Fourth Amendment.

This matter proceeded to trial by jury on May 11, 1999. On May 21, 1999, the jurors returned a verdict which found that the individual defendant officers did not use any

excessive or unreasonable force on plaintiff and that the individual defendant officers did not arrest and/or hold plaintiff without probable cause. The jurors then found that plaintiff's civil rights were violated by reason of a policy, custom or practice of the Long Beach Police Department.

On February 15, 2002, the Ninth Circuit Court of Appeals issued an opinion in which it ruled that the City of Long Beach may be held liable under Section 1983 even though the individual defendant officers are exonerated. The Ninth Circuit Court of Appeals also ruled that detention pursuant to a valid warrant deprived plaintiff of a constitutional liberty because the City of Long Beach failed to institute an identification procedure that may have disclosed that the prisoner was the wrong person and that the City of Long Beach was liable even though there was no evidence of any prior incidents of a twin or other person being mistakenly held on a warrant prior to plaintiff's arrest.

REASONS FOR GRANTING THE WRIT

I. This Court Should Review The Holding Of The Ninth Circuit That A City May Be Held Liable Under Section 1983 Even Though A Jury Has Determined That The Individual Officers Did Not Inflict Any Constitutional Harm.

In a case similar to the present, *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986), the jury found that the individual officers did not arrest the plaintiff without probable cause and did not use excessive force on the plaintiff. After the jury returned this verdict in favor of the individual officer, the District Court dismissed the action against the city concluding there could be no basis for city liability if the officer had been exonerated by the jury.

The Ninth Circuit in *Heller* believing that the jury could have believed that the officer, having followed department regulations, was entitled in substance to a defense of good faith, and that such a belief would not negate the existence of a constitutional injury. This Court, however, disagreed with the Ninth Circuit and found that the jury's negative finding was conclusive not only as to the officer, but also as to the city. This Court pointed out that:

> [N]either *Monell v. New York City Dept. of Social Services* [cite], nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. ***If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.***

Id. at 475 U.S. 799, 89 L. Ed. 2d 811. (Emphasis added).

In the present case, plaintiff Fairley, like the plaintiff in *Heller*, claimed his Constitutional rights were violated by being arrested without probable cause and being subjected to unreasonable force. The jury, however, found that there was probable cause to arrest and/or hold plaintiff and that no excessive force was used on plaintiff. As in *Heller*, these findings are conclusive that no constitutional harm was inflicted on plaintiff, and as such, there can be no liability attached to the City of Long Beach.

In its per curiam decision, the Ninth Circuit misstates this Court's decision in *Heller* . In an extreme departure from well settled law, the Ninth Circuit erroneously states that this Court's decision in *Heller* was controlling authority ***only*** as to plaintiff's excessive force case and that *Heller* had "no bearing on [plaintiff's] Fourth and Fourteenth Amendment claims against the City for arrest without probable cause and deprivation of liberty without due process." (*Fairley v. Luman*, 281 F.3d 913, 916-17 (9th Cir. 2002).[2] Contrary to the Ninth Circuit's decision, *Heller* concerned claim of excessive force and arrest without probable cause.

II. This Court Should Review The Holding Of The Ninth Circuit That An Individual's Detention On A Valid Warrant May Create A Constitutional Injury Because A City Failed To Institute An Identification Procedure That May Have Disclosed That The Detainee Was The Wrong Person.

In a case that falls on all fours with the present case, *Baker v. McCollan*, 443 U.S. 137, 61 L. Ed. 2d 433 (1979), the plaintiff was arrested on a valid warrant intended for his brother, and despite repeated protests of innocence, the plaintiff was held in custody for eight days. This Court rejected the plaintiff's assertion that his imprisonment violated his constitutional rights. This Court pointed out that "the Constitution does not guarantee that only the guilty will be arrested." (*Id.* 443 U.S. at 145.) This Court's analysis was that due process was satisfied by a facially valid warrant and that detention under the warrant required neither a probable cause hearing nor effective identification procedures.

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2. In *Gibson v. County of Washoe*, __ F.3d __, 2002 WL 1022340, 2002 Daily Journal D.A.R. 5649 (9th Cir. May 22, 2001) the Ninth Circuit, citing to its *Fairley* decision, has once again ruled that a municipality may be held liable even though the individual defendants were exonerated.

In the present case, the Ninth Circuit erroneously asserts that "due process imposes a requirement to take steps to verify a detainee's identity before transferring the detainee." (*Fairley v. Luman*, 281 F.3d 913, 918 n.5 (9th Cir. 2002). The Ninth Circuit's ruling is in direct conflict with this Court's decision in *Baker*. As stated above and contrary to the Ninth Circuit's decision, this court specifically ruled in *Baker* that due process was satisfied by a facially valid warrant and that detention under the warrant required neither a probable cause hearing nor effective identification procedures.

In the present case, plaintiff Fairley was held on a valid warrant, and after two days, plaintiff was turned over to the Los Angeles County Sheriff's Department who handle the outstanding warrants for the Los Angeles County Court System. Pursuant to *Baker*, the detention of plaintiff did not violate his constitutional rights.

III. This Court Should Review The Holding Of The Ninth Circuit That A City May Be Held Liable Based Upon A City's Failure To Initiate Procedures To Reduce The Likelihood Of Detaining The Wrong Individual On A Warrant, When There Is No Evidence Of Any Pattern Of Similar Incidents Prior To Plaintiff's Arrest.

Municipal liability under Section 1983 can only be imposed for injuries inflicted pursuant to an official government policy or custom. (*Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 56 L. Ed. 2d 611 (1978).) A municipality or governmental entity cannot be found liable under Section 1983 on a respondeat superior theory. (*Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412 (1989).) As the United

States Supreme Court explained in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L. Ed. 2d 452 (1986):

> The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' — that is, acts which the municipality has officially sanctioned or ordered.

Id. at 475 U.S. 479-80, 89 L. Ed. 2d 463. (Emphasis is original).

The existence of a policy, without more, is insufficient to trigger local government liability under Section 1983. (*Canton v. Harris*, 489 U.S. at 388-89.) Under *Canton v. Harris*, before a local government entity may be held liable for failing to act to preserve a constitutional right, plaintiff must demonstrate that the official policy "evidences a 'deliberate indifference'" to his constitutional rights. (*Id.* 489 U.S. at 389.) This occurs when the need for more or different action "is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." (*Id.* 489 U.S. at 390.)

In the present case, the Ninth Circuit ruled that plaintiff established his *Monell* claim because of the police chief's "decision not to instigate procedures to alleviate the problem

of detaining individuals on the wrong warrant."[3] (*Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002). There was no evidence of any prior incidents of a twin or other person being mistakenly held on a warrant prior to plaintiff's arrest. There was no evidence presented to place any official from the City of Long Beach on notice that its procedures that were in place at the time of plaintiff's arrest were in anyway inadequate. Plaintiff cannot prove the existence of a municipal policy based solely on a single incident.[4] (*See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 85 L. Ed. 2d 791 (1985).)

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3. The Ninth Circuit's Opinion erroneously states that the City of Long Beach did not have any procedures in place to alleviate the problem of detaining individuals on wrong warrants. It was undisputed at trial that the City of Long Beach had a policy that all persons booked into the City jail go through a fingerprint check to verify any warrants, but the City of Long Beach was unable to locate plaintiff's release card verifying that a fingerprint check was performed on plaintiff.

4. The Ninth Circuit's Opinion erroneously ruled that Chief Luman was the final policy maker. As set forth in *Jett v. Dallas Ind. School District*, 491 U.S. 701, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989), the question of whether a particular official has final policy making authority is a question of state law. Article 11, Section 2, of the *California Constitution* grants to municipalities the power to establish and run their city by way of charter. Pursuant to Section 300 of the Charter of the City of Long Beach, the chief administrative officer of the City of Long Beach is the city manager. Furthermore, Section 302 of the city charter empowers the city manager to direct and supervise the administration of all manager-directed departments of the city and to see that all laws, ordinances, orders, resolutions, contracts and franchises are enforced and executed. As such the City Manager is the final policy-making official for the conduct of the City's police department.

The Ninth Circuit's decision refers to *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992), but the *Oviatt* decision does not support the Ninth Circuit's ruling. In *Oviatt*, the Court found the sheriff acted with deliberate indifference based upon the Sheriff acknowledging 19 incidents between 1981 and 1989 in which individuals sat in jail for undetermined length after they missed arraignment. In the present case, there is no evidence that there was a pattern of similar incidents prior to plaintiff's arrest.

CONCLUSION

For all of the foregoing reasons, Petitioner City of Long Beach respectfully request that its petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED FEBRUARY 15, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-56483

D.C. No.
CV-99-00063-DOC-EEx

JOHN B. FAIRLEY,

Plaintiff-Appellee,

v.

ROBERT LUMAN, Chief; CITY OF LONG BEACH; JON PAUL JAVELLANA, Officer #9691, f/k/a Doe 1, a/k/a JAVELLANA; STEVEN L. ROMERO, Officer #5476, f/k/a Doe 2, a/k/a ROMERO; RYAN FORD, Sgt.,

Defendants-Appellants.

Appeal from the United States District Court for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted
March 7, 2001 — Pasadena, California

Filed February 15, 2002

Appendix A

Before: James R. Browning, Melvin Brunetti, and Michael Daly Hawkins, Circuit Judges.

Per Curiam Opinion

OPINION

PER CURIAM:

Plaintiff was detained by officers of the City of Long Beach Police Department ("City") and held for twelve days on outstanding warrants for the arrest of his twin brother. Plaintiff brought a suit under 42 U.S.C. § 1983 against the detaining officers and booking sergeant for use of excessive force and arrest without probable cause and a *Monell* claim against the City for violation of plaintiff's civil rights by reason of a policy, custom or practice of its Police Department. The jury exonerated the individual officers but found the City liable, awarding plaintiff $11,250. The district court awarded attorney fees in the amount of $92,211.83. The City appeals. We affirm.

I.

On April 26, 1997, John Fairley ("John") was taken into custody by Long Beach Officers Romero and Javellana for allegedly violating a temporary restraining order after a confrontation with his next door neighbor. John claimed the officers used excessive force when taking him into custody.

After John was in custody, Officers Romero and Javellana ran a warrant check and found two 1995 infraction

warrants for *Joe* B. Fairley, John's identical twin brother. The physical descriptions of the two men were similar in certain respects: both were black, between 5'6" and 5'8", and, of course, were the same age. However, their weights differed by approximately 66 pounds and the driver's license number on one of the warrants was similar, but not identical, to the number on John's license. John had not had contact with the police in almost ten years and both he and his wife told the officers the warrants had to be for Joe. The officers knew John had a twin: the temporary restraining order application said so and his next door neighbor pointed that fact out to the officers.

Officers Romero and Javellana told the booking sergeant, Ford, that John Fairley had a twin brother, as did John himself, insisting the warrants were for his twin. Nonetheless, Sergeant Ford approved John's booking on the warrants based on the similarity in the physical descriptions alone. Neither a fingerprint comparison nor Department of Motor Vehicles check was completed at any time during John's twelve-day detention. Either would have immediately alerted the City it had the wrong man.[1]

John continuously protested the mistaken identity over the course of his twelve-day detention. Prison officials responded by reducing his privileges. Although the charge against John was dropped three days after his arrest, the police continued to hold him on Joe's infraction warrants and later transferred him to the Los Angeles County jail. John was released only after filing a citizen's complaint from jail.

1. The City concedes it had the fingerprints of both men which could easily have been compared.

The ensuing internal affairs investigation found the City's policies and procedures had been fully complied with in the handling of John's case.

John filed this lawsuit against Officers Romero and Javellana, the booking officer, Sergeant Ford, and the City for violation of his constitutional rights.[2] The jury exonerated the individual officers of using excessive force and arresting John without probable cause, but found the City liable for violating John's civil rights "by reason of a policy, custom or practice of the Long Beach Police Department." The district court denied the City's motion for judgment as a matter of law or, in the alternative, for a new trial. The City appealed.

II.

The City's principal argument is that it is entitled to judgment as a matter of law because the jury determined that the individual officers had inflicted no constitutional injury.

In *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), the Supreme Court held that municipalities were "persons" under § 1983 and thus could be held liable for causing a constitutional deprivation.[3] *Id.* at 690. The Court

2. Charges against Chief of Police Robert Luman in his individual and official capacities were dismissed at trial.

3. Section 1983 provides that "any person" who under the color of law causes the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983.

explained that while a municipality may not be held liable under § 1983 for the torts of its employees on a theory of *respondeat superior*, liability may attach where the municipality *itself* causes the constitutional violation through the execution of an official policy, practice or custom. *Id.* at 690-691.

The City claims the Supreme Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), and this court's decisions in *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), and *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996), preclude municipal liability as a matter of law under § 1983 when the jury exonerates the individual officers of constitutional wrongdoing. In *Heller*, the Supreme Court held a jury's determination that an individual officer did not use constitutionally excessive force precluded § 1983 municipal liability on that ground. *Heller*, 475 U.S. at 799. ("neither *Monell* [citation omitted] nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitution harm.") Similarly, in *Scott* and *Quintanilla*, we affirmed summary judgment in favor of cities sued under § 1983 where the defendant officers charged with excessive force were individually exonerated. *Scott*, 39 F.3d at 916; *Quintanilla*, 84 F.3d at 356.

Heller, *Scott* and *Quintanilla* control John's excessive force claim. Exoneration of Officer Romero of the charge of excessive force precludes municipal liability for the alleged unconstitutional use of such force. To hold the City liable

for Officer Romero's actions, we would have to rely on the § 1983 *respondeat superior* liability specifically rejected by *Monell*.

However, these decisions have no bearing on John's Fourth and Fourteenth Amendment claims against the City for arrest without probable cause and deprivation of liberty without due process. These alleged constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department.

In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court recognized that the city could be held independently liable under § 1983 for failure to train its police officers even though no individual defendants were sued. This Court reached the same conclusion in *Oviatt v. Pearce*, 954 F.2d 1470, 1477-79 (9th Cir. 1992), deciding § 1983 liability could attach to a city because it failed to implement internal procedures for tracking inmate arraignments. Even more to the point, in *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), we held that a city could be liable under § 1983 for improper training or improper procedure even if the individual officer charged with violating the plaintiff's constitutional rights was exonerated.

The district court did not err by denying the City's motion for judgment as a matter of law on the *Monell* claim based on the jury's exoneration of the individual officers alone. If a plaintiff establishes he suffered a constitutional injury *by the City*, the fact that individual officers are exonerated is

immaterial to liability under § 1983.[4] Otherwise, municipal liability may attach where a constitutional deprivation is suffered as a result of an official city policy but no individual officer is named as a defendant, *see City of Canton,* but not where named individual officers are exonerated but a constitutional deprivation was in fact suffered. In either case, a constitutional deprivation — the touchstone of § 1983 liability — was a consequence of city policy.

III.

The City claims John's *Monell* claim failed because he did not prove he suffered a constitutional injury or that the City had a policy, custom, or practice that caused such injury. Since the jury did not specify the constitutional deprivation upon which it based its finding of municipal liability, we consider whether, viewed in the light most favorable to John and drawing all reasonable inferences in his favor, there is sufficient evidence for a reasonable jury to find John met his burden on any claim supported by the record. *See Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1060 (9th Cir. 2000);

4. This is true whether the officers are exonerated on the basis of qualified immunity, because they were merely negligent, or for other failure of proof. *See Chew v. Gates,* 27 F.3d 1432, 1438 (9th Cir. 1994) ("Supervisorial liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury."); *Fagan v. City of Vineland,* 22 F.3d 1283,1291-1294 (3d Cir. 1994) (holding municipality may be liable under § 1983 even if no individual officer violated the Constitution); *Cannon v. Taylor*, 782 F.2d 947, 951 (11th Cir. 1986) (considering municipal liability for failure to train after individual defendant officer found not liable because merely negligent).

Fed. R. Civ. P. 50(a)(1). We conclude there was sufficient evidence for a reasonable jury to find John suffered a constitutional deprivation under the Fourteenth Amendment. We do not address his Fourth Amendment claims.

A. *Constitutional Injury*

Even detention pursuant to a valid warrant but in the face of repeated protests of innocence will, after a lapse of time, deprive the accused of a constitutional "liberty." *Baker v. McCollan*, 443 U.S. 137, 143 (1979). "[A]n individual has a liberty interest in being free from incarceration absent a criminal conviction." *Lee v. City of Los Angeles*, 250 F.3d 668, 683 (9th Cir. 2001) (quoting *Oviatt*, 954 F.2d at 1474). Indeed, we have stated freedom from incarceration is the "paradigmatic liberty interest" under the due process clause. *Oviatt*, 954 F.2d at 1474.

John had a liberty interest in being free from a twelve-day incarceration without any procedural safeguard in place to verify the warrant he was detained on was his and in the face of his repeated protests of innocence.[5] In light of the importance of John's liberty interest, the significant risk of deprivation of that interest through the City's warrant procedures, and the minimum burden to the City of instituting

5. The City's responsibility for his detention was not defeated by John's transfer to the L.A. County Jail for four days. Due process imposes a requirement to take steps to verify a detainee's identity before transferring the detainee. The consequences of the transfer were foreseeable and the transfer did not break the chain of causation between the City's failure to take steps to identify John and his detention.

readily available procedures for decreasing the risk of erroneous detention, the procedures afforded by the City to John failed to provide him due process under the Fourteenth Amendment.[6]

B. *Policy or Custom*

A "policy" is " 'a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.' " *Oviatt*, 954 F.2d at 1477 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)). A "policy" can be one of action, *see Monell*, 436 U.S. at 661 (forcing women to take early maternity leave), or inaction, *see City of Canton*, 489 U.S. at 387 (failure to train); *Oviatt*, 954 F.2d at 1477 (failure to implement adequate procedural safeguards).

John presented evidence sufficient to establish the City's warrant procedures constituted a "policy." Chief Luman testified at trial that he was "the chief policymaker for law enforcement matters for the City of Long Beach." His decision not to instigate any procedures to alleviate the problem of detaining individuals on the wrong warrant could constitute a policy in light of his testimony he knew it was "not uncommon" that individuals were arrested on the wrong

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6. Under *Mathews v. Elderidge*, 424 U.S. 319, 335 (1976), three factors are used to evaluate whether procedural protections comport with due process: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and probable value of additional safeguards; and (3) the Government's interest.

warrant, and that the problem was particularly acute where twins were involved. As in *Oviatt,* where the city failed to implement internal procedures for tracking inmate arraignments, the policy was one of inaction: wait and see if someone complains. *Oviatt*, 954 F.2d at 1477.

IV.

The evidence admitted at trial was legally sufficient to permit a reasonable jury to find the City liable under John's § 1983 *Monell* claim even though the jury found the individual defendants inflicted no constitutional harm. Since the verdict was not contrary to the clear weight of the evidence, the district court did not abuse its discretion by denying the City's motion for a new trial.

The district court's denial of judgment as a matter of law, and in the alternative, a new trial is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED AND FILED APRIL 2, 2002

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-56483

D.C. No. CV-99-00063-DOC-EEx

JOHN B. FAIRLEY,

Plaintiff-Appellee,

v.

ROBERT LUMAN, Chief; CITY OF LONG BEACH; JON PAUL JAVELLANA, Officer #9691, f/k/a Doe 1, a/k/a Javellana; STEVEN L. ROMERO, Officer #5476, f/k/a Doe 2, a/k/a Romero; RYAN FORD, Sgt.,

Defendant-Appellant.

ORDER

Before: BROWNING, BRUNETTI, and HAWKINS, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Judge Hawkins has voted to deny the petition for rehearing en banc, and Judges Browning and Brunetti so recommend.

Appendix B

The full court has been advised of the petition for an en banc rehearing, and no judge of the court has requested a vote on the petition. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the petition for rehearing en banc is rejected.